United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1364

To be argued by
RICHARD H. KUH

B P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

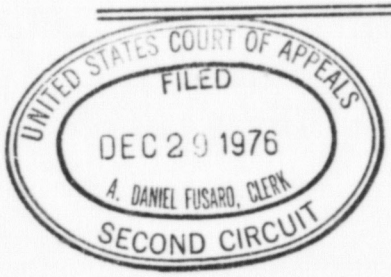
—against—

EDWARD PASTOR and MARTIN WEINER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT PASTOR



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for the Southern District of New York

REPLY BRIEF
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PRELIMINARY STATEMENT

This brief is submitted by appellant-Pastor in reply to the brief filed by the United States of America, plaintiff-appellee.

POINT I

Pastor was ill and involuntarily absent when Judge Motley ordered the selection of his jury (replying to the Government's Brief, Point III, pp. 30-42).

In responding to appellant Pastor's argument that the impanelling of a jury when he was ill violated his constitutional and statutory rights, the Government's brief relies principally upon an opinion filed by Judge Motley the day after appellant Pastor filed its brief with this Court. In her thirty-four-page memorandum opinion, Judge Motley attempts to rationalize and justify her decision to impanel a jury in Pastor's absence with after-the-fact characterizations and conclusions concerning Pastor and his counsel, all of which have absolutely nothing to do with the clear and single issue, to wit, whether Pastor was ill on the morning of May 18th when Judge Motley impanelled the jury in his absence.

The objective evidence of Pastor's illness on the morning of May 18th emphatically and unequivocally shows that his absence from court was not volitional. Pastor had a long history of serious heart illness, as the Government, of course, concedes (brief, pp. 33-35), and as recently as February had suffered congestive heart failure (A305-06).* On the basis of the seriousness of his condition, and the length of his projected hospitalization in February, the Court adjourned the trial for three months.

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* References preceded by "A" refer to the pages in the Appellants' Appendix; references preceded by "T" refer to the pages in the trial transcript.

There is no dispute that on the date scheduled for the trial to commence -- May 17th, 1976 -- Pastor was present in court and prepared to proceed with the selection of the jury; a panel of jurors had been summoned that day and was waiting to be called (A315). Instead, a hearing was held (A312). On the following morning, May 18th, at about 9:00 o'clock, Pastor's counsel informed Judge Motley that Pastor had suddenly taken ill, was being administered oxygen, and that Doctor Texon had been notified and requested to examine Pastor (A320-21). Judge Motley responded (A322):

> "I don't have any doctor's certificate here, Mr. Cooper, (Pastor's counsel) showing that Mr. Pastor is unable to attend Court this morning, so his bail is revoked and the United States marshals are ordered now to go and get him. We are going to proceed in his absence."

Judge Motley refused to listen to defense counsel's application for an hour's continuance to obtain a medical certificate (A324). (A medical certificate was presented later that morning.) Similarly, the Government's application that jury selection be deferred was denied by Judge Motley (A323).

No amount of retrospective rationalization either by Judge Motley or the Government can justify impanelling the jury under the circumstances, nor can such arguments undo that gross error. The Government's own doctor, as well as Pastor's, attested to Pastor's illness that morning (A310-11, A360-2). Pastor's

doctor found that Pastor was suffering from "severe acute myocardial ischemia with possible acute myocardial infarction or impending acute myocardial ischemia," as manifested by changes in his electrocardiogram, and recommended Pastor's hospitalization (A310). Upon his examination of Pastor at 6:00 P.M. on May 18, Doctor Texon found that Pastor had indeed suffered an episode of coronary insufficiency and myocardial ischemia. Doctor Texon also observed changes in Pastor's electrocardiogram, namely, depression in the precordial leads, and recommended that Pastor remain hospitalized at least for another 24 hours, after which time further re-evaluation should be made (A360-2).

Thus, Judge Motley's conclusions that "Mr. Pastor voluntarily, knowingly and without justification failed to be present on May 18th," and her finding that "Pastor did not suffer a physiological impairment so severe and so serious as to excuse his absence from Court on that morning" (opinion of November 17, 1976, p. 27) are astounding and totally belied by both medical experts who had examined Pastor. Moreover, that Pastor's counsel did not at 9:00 o'clock that morning present a doctor's certificate as Judge Motley required, is hardly significant under the circumstances; a medical certificate was presented to the court a little over two hours later. For Judge Motley to suggest from hindsight the courses of action that Pastor

or his attorney should have taken under the traumatic circumstances of his illness -- i.e., to telephone Doctor Kuhn, not to have telephoned Doctor Texon, what course of action to have followed in the hotel, when to have gone to the hospital -- is unfair and unwarranted, particularly since, as the record amply reflects, none of those considerations ever even remotely played any part in the court's determination to select the jury.*

Further, in view of the medical proof as to Pastor's illness on May 18th, Judge Motley's assertion that Pastor "intentionally manipulated" a marginally painful episode to delay his trial is astounding (ibid., p. 30). To support her assertion that Pastor manipulated his condition, Judge Motley selects from a record well in excess of 2,000 pages, two isolated instances to suggest that Pastor was seeking to convey to the jury that he was ill. This is hardly the case. If Pastor's intention was to manipulate his condition, he could have done so far more dramatically and continuously. Moreover, the acts that the court refers to, i.e., taking certain medication

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* Judge Motley asserts in her opinion, without any basis in the record, that telephoning Dr. Texon was a "transparent ploy," since Pastor and his attorney knew that Texon would not respond (opinion, p. 27). Judge Motley's insinuation is wrong. As the record amply demonstrates, the only doctor whose opinion Judge Motley apparently respected was the Government's. Accordingly, it was logical that the defense would try to contact him under the extremely frenetic circumstances of that morning.

allegedly in the presence of the jury and wearing a bandage under his shirt signifying his presence in the hospital, were hardly of the large dimension the court seeks to convey. Further, there was never a dispute that Pastor was ill and had a history of heart illness; this was abundantly clear to the jury through the testimony of federal narcotic agent Vigna (T1805-06, T1825-6, T1833).

Further, aside from the objective evidence of Pastor's illness on May 18, Judge Motley's subjective characterizations of Pastor and his counsel reveal a biased attitude toward this defendant manifested by Judge Motley's regrettable remark on May 13th: "This is not the first defendant who has claimed to have a heart attack" (T22). In her opinion, Judge Motley suggests that Pastor's counsel was responsible for pre-trial delays. The record is clear, however, as the court concedes in its opinion (pp. 3-4), that much of the delay was attributable to the Government, first for failing to provide the defense with documents relevant to preparing pre-trial motions, by instituting four different presentations to grand juries in this case (75 Cr. 753, 76 Cr. 145, 76 Cr. 253), by obtaining two superseding indictments (76 Cr. 145 and 76 Cr. 253), as well as one "no-true bill". Indeed, the final indictment was filed on March 12, 1976, one month after the date originally set for trial to commence.

In keeping with this attitude towards the defendant, Judge Motley's opinion (pp. 13-15) points to an alleged inconsistent statement made by Pastor in a medical report as significant proof of his untruthfulness. It is noteworthy that the court apparently exhaustively studied the masses of medical reports filed in this case, as well as the hundreds of pages of medical testimony, to attempt to glean any possible discrepancy. In reality, however, there is no discrepancy between the two reports as they refer to Pastor's account of his condition relative to two different periods of time.

As Appellant Pastor pointed out in his main brief, the law is clear that the selection of a jury in the defendant's involuntary absence violates his constitutional and statutory rights and by itself, requires reversal.* Moreover, as this court recently pointed out in United States v. Toliver, 541 F.2d 958, 964 (1976), even in cases of outright waiver, not the case here, a "trial should not routinely proceed."

The three principal cases cited by Judge Motley to justify her action if anything vividly demonstrate her error.

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* Although Judge Motley asserts that Pastor and his counsel manipulated the events of May 18 as part of an overall strategy to frustrate the trial, it should be noted here again, as appellant pointed out in its main brief, that on the following day, May 19, Pastor's counsel moved for a mistrial in view of the selection of the jury in Pastor's absence (A402, A404). And while the Government's brief argues that Weiner was "entitled to have the Court proceed as to him" (p. 41), it should be noted that Weiner joined in the motion for mistrial (A404-05).

November 16, 1976 opinion below, notwithstanding that

In each of the three cases -- United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972), cert. denied, 409 U.S. 1063 (1972); Government of the Virgin Islands v. Brown, 507 F.2d 186 (3rd Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975) -- the defendant offered no explanation for his absence. Indeed, in both Peterson and Tortora, the defendant absconded to escape prosecution. By contrast, in the instant case, Mr. Pastor's whereabouts were known to all; he was uptown ill in a hotel room and later in a hospital emergency room. Moreover, in Brown, supra, no peremptory challenges were exercised until the defendant returned to the courtroom that afternoon, nor was any objection interposed by the defendant to the jurors remaining after the voir dire had taken place in his absence. Also, in both Peterson and Tortora, supra, at least four defendants were awaiting trial at the time that the fifth defendant had fled. Notwithstanding those clear and blatant instances of voluntary absence, both this Court in Tortora, supra, and the Circuit Court in Peterson, supra, were required to find that extraordinary circumstances inherent in those cases justified the trial court in proceeding in the absence of the fugitive defendants. Among the factors considered in both cases were the numerous witnesses the Government had assembled to testify; the reluctance of one of the critical Government witnesses to

defendant's absence.

testify; the obvious burden on the Government in having to undertake the two separate trials under the circumstances, or the substantial risk that delay might prejudice the Government if a continuance were granted. In view of the remoteness of the speedy return of the fugitive defendants, both Tortora and Peterson held that the public interest clearly outweighed the interest of the voluntarily absent defendants. Needless to say, the circumstances of the instant case are as different from Tortora and Peterson as night is from day.

POINT II

> The Government has failed to refute the arguments demonstrating the unconstitutionality of the act in question (Replying to the Government's Brief, Point I, pp. 11-24).

While the Government concedes, as it must, that the ultimate authority to decide whether or not to criminalize the use of the drugs in question -- phendimetrazine and phentermine -- and the severity of the punishment for their use, resides with the Attorney General (brief, pp. 15-16), the Government has failed to justify under the Constitution the propriety of the exercise of that power, the standards utilized and the manner in which those standards were complied with.

The Government characterizes the determination of the Attorney General to schedule these drugs as merely "filling in details" relating to the congressional legislation (brief, p. 13). Such is not even remotely the case. As appellant Pastor already pointed out in his main brief, no such massive delegation of power to the nation's chief law enforcement officer to declare a crime, impose a penalty, and to prosecute that crime has ever before been attempted. Interestingly, the only decision addressing this precise question -- Howell v. Mississippi, 300 So.2d 774 (1974) -- decisively supports appellant's position that the delegation here is absolutely violative of the constitutional doctrine of Separation of Powers. The Government dismisses that case in two cursory paragraphs (brief, p. 14), urging simply that the Constitution of the State of Mississippi is different from the United States Constitution. Needless to say, the doctrine of Separation of Powers is articulated with equal emphasis in both constitutions in very similar language, each prohibiting one branch of government from exercising powers belonging to the other branches.

Moreover, the Government conclusorily asserts without elaboration that the standards to guide the Attorney General are precise (brief, pp. 17-18). In response to the appellant's reference to a memorandum by Dr. Henry E. Simmons, a high official

in the Bureau of Drugs of the Food and Drug Administration, stating that the standards in question are "for the most part vague and redundant" (A102-3), the Government dismisses his opinion as "irrelevant" (brief, p. 17).

Further, there is absolutely no basis for the Government's conclusion that the Attorney General indeed considered the required eight factors in deciding to schedule the drugs. It is undisputed that no hearing was ever held, nor was any other recorded proceeding ever conducted with respect to the determination to schedule these drugs. The sole basis upon which the determination was made to schedule the drugs was a "meeting" on March 30, 1973, wherein an official of the Bureau of Narcotics and Dangerous Drugs received certain information concerning the drugs from the Food and Drug Administration. It is undisputed that no minutes or memoranda of this meeting were ever recorded (see Government's Brief, p. 20). Allegedly, based only upon this meeting, the Attorney General decided to schedule the drugs. As appellant noted in his main brief, upon a Government affidavit alone, the court below determined that there was no showing that the Attorney General had abused his discretion in deciding to schedule the drugs. In an opinion written four months after the Government's affidavit was submitted, Judge Motley concluded that no hearing on the issue was necessary in that such a proceeding "would presumably amplify (the Government's statements" (A442).

Court held in Tantone, "should be exercised only when the public

POINT III

Venue was improperly laid in the Southern District (Reply to the Government's Brief, Point II, pp. 24-30)

The Government laboriously attempts, to no avail, to sustain venue in the Southern District of New York. Without citing any authority, the Government categorically asserts that the substantive violations herein are not "single act" violations but, rather, continuing violations (brief, p. 26). As appellant Pastor pointed out in his main brief, the cases emphatically refute the Government's position. United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); United States v. Barnard, 490 F.2d 907 (9th Cir. 1974); United States v. Walden, 464 F.2d 1015 (4th Cir. 1972); United States v. Coppola, 486 F.2d 882 (10th Cir. 1973); see also, Travis v. United States, 364 U.S. 631 (1961); United States v. Johnson, 323 U.S. 273 (1944); United States v. Rodriquez, 465 F.2d 5 (2d Cir. 1972).

Moreover, the Government's reference to certain activities of the defendants allegedly having taken place in the Southern District, while arguably relevant to a conspiracy theory, have absolutely no relevance to the substantive counts herein. In any event, as to counts 5 and 6, upon which the defendants were convicted, there were no acts at all performed

by Pastor or Weiner in the Southern District. The Government's brief is factually misleading in this respect. For instance, the Government's reference to "two trips" by Pastor and Weiner into the Southern District as constituting "significant steps" to support venue as to counts 5 and 6 (brief, p. 27) is erroneous. These trips occurred in June 1973 prior to the drugs in question ever being scheduled and, needless to say, had nothing whatever to do with any of the substantive charges in the indictment. Further, contrary to the Government's assertion (brief, p. 27), Wingate Sales Corporation had absolutely nothing to do with the transactions contained in counts 5 and 6; Vitarine, a Queens drug distributor, shipped the drugs referred to in those counts to Philadelphia. Finally, the cases of United States v. Bommarito, 524 F.2d 140 (2d Cir. 1975) and United States v. Mc Dougal-Pena, ___ F.2d ___ (2d Cir. December 1, 1976), asserted by the Government to support its theory of venue, is incorrect. Indeed, venue was not even an issue in those cases and was not discussed.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, alternatively, a new trial should be ordered.

Respectfully submitted,

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December 29, 1976

Service of 2 copies of this within
PETE J. PRICE is admitted this
24TH day of DECEMBER 1976

ATTORNEY FOR UNITED STATES OF AMERICA